

could not enforce regulatory compliance by the Telephone Authority was justified because "[w]ithout Commission jurisdiction over this sale, most subscribers in the exchanges would be without the benefit of regulatory review of the proposed sale by any governmental entity in which the subscribers have a political voice." App. 4 at 47. In an effort to address this concern, the Telephone Authority adopted a dispute resolution mechanism to provide a neutral forum where subscribers may seek redress for complaints related to the Telephone Authority's provision of telecommunications services. SR2 116-25; App. 11. This information, like the provisional certificate of convenience and necessity was clearly the type of evidence relied upon by reasonably prudent persons in the conduct of their affairs and thus, should have been considered. If this evidence had properly been considered, the Commission's concerns would have been ameliorated. Thus, the failure to take judicial notice constitutes an abuse of discretion.

While the failure to consider such evidence would ordinarily require a remand, such action is unnecessary in this case because the provisional certificate of convenience and necessity and the dispute resolution mechanism constitute documentary evidence. First National Bank of Biwabik v. Bank of Lemmon, 535 N.W.2d 866, 871-72 (SD 1995) ("[W]hen physical or documentary evidence is offered, the trial court is in no better position to intelligently weigh

the evidence than the appellate court."). See also Kurtz v. SCI, 1998 SD 37 ¶ 10 ("[This Court is] as capable of reading the record as the [Commission]."). Moreover, a remand at this stage of the proceedings would be manifestly unjust to the parties given the passage of time. The Court should instead exercise its discretion and consider the provisional certificate of convenience and necessity and the dispute resolution mechanism. Based on these considerations the Commission's findings with respect to the public interest should be reversed.

CONCLUSION

For the forgoing reasons, the Commission's decisions should be reversed and the sales of the telephone exchanges approved.

Dated this 26th day of May, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing JOINT BRIEF OF APPELLANTS CHEYENNE RIVER SIOUX TRIBE TELEPHONE AUTHORITY and U S WEST COMMUNICATIONS, INC was placed in the U.S. Mail, postage prepaid on the 26th day of May, 1998, to the following:

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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE SALE OF CERTAIN)	DECISION AND ORDER
TELEPHONE EXCHANGES BY U S WEST)	REGARDING SALE OF THE
COMMUNICATIONS, INC. TO CERTAIN)	<u>TIMBER LAKE EXCHANGE</u>
TELECOMMUNICATIONS COMPANIES IN)	
SOUTH DAKOTA)	TC94-122 - TIMBER LAKE

PRELIMINARY STATEMENT

On December 20, 1994, a Joint Application was filed by U S WEST Communications, Inc. (U S WEST), and twenty telecommunications companies (Buyers) requesting that the South Dakota Public Utilities Commission (Commission) approve the sale by U S WEST of 67 local telecommunications exchanges to the Buyers or their affiliates. Specifically, the filing sought:

1. A declaration that the sale and transfer of the exchanges do not require Commission approval or in the alternative that the Commission knows of no reason why the sale and transfer should not occur; and
2. An order from the Commission that U S WEST's gain from the sale be booked to Account 7350 of the Uniform System of Accounts (USOA) as nonoperating income not available for ratemaking purposes.

The Commission assumed jurisdiction over this docket pursuant to its authority under SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, and 49-31-20. The Commission set an intervention deadline of January 25, 1995. Subsequently, the following parties applied for and were granted intervention: AT&T Communications of the Midwest (AT&T); South Dakota Radio Common Carriers [composed of Pierre Radio Paging and Telephone, Inc.; Vantek Communications, Inc.; B&L Communications; Mitchell Two Way Radio; Nelson Electronics, Inc.; Booker Communications; Dakota Electronics; Rees Communications; A & M Radio, Inc.; Frey's Electronics; and Milbank Communications]; Roger D. McKellips; City of Mobridge; Walworth County; Doug Scott; Alcester Telephone System User's Group [composed of Phyllis Bergdale; Bernard Bergdale; Jay Clark; Cleo Clark; Wendell Solberg; Kathy Solberg; Dennis Jones; Robin Jones; Ronald Treiber; Becky Treiber; Gary McKellips; Deb McKellips; David Broadwell; Kathy Broadwell; Donowan Larson; Marlys Larson; Glenice Pilla; and Larry Pilla]; Midco Communications; LDDS; TeleTech; TCIC; FirsTel; TelServ; MCI; Corson County Commission; Thomas Brunner; Gary Brunner; Deanna J. Mickelson; Marjorie Reder; Duane Odle; Baltic Telecom Cooperative; Barbara Mortenson as an individual and a group of telephone users known as the Henry Users Citizens Group. LDDS later filed a petition to withdraw as an intervenor which was granted by the Commission. On March 30, 1995, Senate Bill 240, later codified as SDCL 49-31-59, became effective. The Commission added this statute to the other statutes under which it had asserted its jurisdiction

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On March 29, 1995, the Commission issued an Order for a Notice of Hearing for six regional evidentiary hearings to be held at various locations throughout the state of South Dakota. Notice of said hearings was given to the public by newspaper publications and radio announcements; personal notice was given to all parties to the docket. Pursuant to said Order of the Commission, and subsequent amended Orders, the following regional evidentiary hearings were held:

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1. In the Agreement with Golden West Telephone Properties, Inc., delete in Exhibit A the Newell exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly;
2. In the Agreement with West River Cooperative Telephone Company, Inc. (Bison), delete in Exhibit A the McIntosh exchange and add the Newell

and Nisland exchanges, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly; and

3. In the Agreement with Cheyenne River Sioux Tribe Telephone Authority, delete in Exhibit A the Nisland exchange and add the McIntosh exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly.

Due to the amended application, the Commission set a new intervention deadline of May 12, 1995. Subsequently, the city of McIntosh and Corson County applied for and were granted intervention. Because the application had been amended, the Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, McIntosh, South Dakota, for public testimony.

At each regional evidentiary hearing, representatives from U S WEST and each purchasing company were present to testify and were available for cross-examination.

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The final hearing was held on June 1-4, 1995. At said final hearing, 42 witnesses testified and were available for cross-examination, 126 exhibits were offered and received into the record at the hearing, and an additional 19 exhibits were filed by June 19, 1995, which was the deadline set by the Commission for late-filed exhibits.

On June 7, 1995, the Commission issued a Post-hearing Order requesting briefs on certain issues and allowing the submission of Proposed Findings of Fact and Conclusions of Law. On June 19, 1995, the parties submitted late-filed exhibits. On June 23 and July 3, 1995, the parties filed their post-hearing briefs and Proposed Findings of Fact and Conclusions of Law.

On July 13, 1995, at a duly noticed meeting, the Commission unanimously voted to not approve the sale of the Timber Lake exchange to Cheyenne River Sioux Tribe Telephone Authority (CRSTTA) which proposed to purchase the Timber Lake exchange through its subsidiary, Owl River Telephone, Inc. (Owl River). With regard to the sale of the Timber Lake exchange, in conjunction with the sale of all the other exchanges, the Commission has reviewed all exhibits presented at the seven regional evidentiary hearings, and the final hearing occurring in Pierre, and has considered all testimony provided. The Commission having reviewed the evidence of record and being fully informed in the matter makes the following:

FINDINGS OF FACT

1. U S WEST is a Colorado corporation providing local exchange telecommunications service, interexchange carrier access, intraLATA interexchange telecommunications services, and other telecommunications services throughout South Dakota.

2. On or about December 7, 1994, U S WEST entered into purchase agreements for the sale of 67 local exchanges with 20 local exchange telecommunications companies. On December 20, 1994, U S WEST and the Buyers filed a Joint Application for a Commission Declaration on the Sale and for Proper Accounting Treatment of any Gain. Exhibit 29. U S WEST and the Buyers filed all 20 purchase agreements along with the Joint Application. Exhibits 31-50. One of the purchase agreements entered into was between U S WEST and the Buyer. Exhibit 32.

3. CRSTTA is a telecommunications company and a division of the Cheyenne River Sioux Tribe. CRSTTA currently provides telecommunications services in South Dakota. Exhibit 22 at page 119.

4. Owl River is a wholly-owned subsidiary of CRSTTA incorporated under the laws of the Cheyenne River Sioux Tribe. Exhibit 22 at page 119. Owl River has no license to do business in the state of South Dakota. Exhibit 22 at pages 145-146.

5. The purchase agreement entered into between CRSTTA and U S WEST states as follows:

Seller and Buyer agree to promptly file any required application and to take such reasonable action as may be necessary or helpful (including, but not limited to, making available witnesses, information, documents, and data requested by the PUC) to apply for and receive approval by the PUC for the transfer of Assets and Authorities to Buyer.

Exhibit 32, Section 6.3, subparagraph D.

6. In the Joint Application filed with the Commission on December 20, 1994, U S WEST and CRSTTA had entered into a purchase agreement where U S WEST proposed to sell the Nisland, Timber Lake, and Morrystown exchanges to CRSTTA.

7. A duly noticed public hearing was held at Mobridge, South Dakota, on April 17, 1995, at the City Auditorium, beginning at 8:00 p.m., concerning, along with other sales, the sale of the Timber Lake, Morrystown, and McIntosh exchanges. At the time of the hearing, West River Cooperative Telephone, Inc. (West River) was the proposed buyer of the McIntosh exchange.

8. A duly noticed public hearing was held at Sturgis, South Dakota, on April 18, 1995, beginning at 7:00 p.m. M.D.T. concerning, along with other sales, the sale of the Nisland exchange. At the hearing, the Buyers announced that CRSTTA would no longer be purchasing the Nisland exchange. Instead, West River proposed to purchase the Nisland and Newell exchanges and CRSTTA proposed to purchase the McIntosh exchange which West River had originally intended to purchase. Exhibit 23 at pages 5-6.

9. The amended Joint Application setting forth the changes in the buyers of the Nisland, Newell, and McIntosh exchanges was filed with the Commission on May 1, 1995. Exhibit 30. Due to the amendment of the Joint Application, the Commission set a new intervention deadline of May 12, 1995. The city of McIntosh and Corson County applied

for and were granted int. .ention. The Commission held an .er public hearing on May 25, 1995, at the McIntosh School Gymnasium, in McIntosh.

10. On June 1-4, 1995, in Pierre, South Dakota, a final hearing was held concerning all of the proposed exchange sales. Members of the public testified in opposition to and in support of the sale of the Timber Lake exchange to CRSTTA. Transcript of Pierre Hearing at pages 707-727, 738-779. The two main concerns of the public who testified in opposition to the sale were the lack of Commission oversight and the loss of tax dollars.

11. The Timber Lake exchange is located within the boundaries of the Cheyenne River Sioux Reservation and the Standing Rock Sioux Reservation. Exhibit 93.

12. CRSTTA maintains that if the sale of the Timber Lake exchange to CRSTTA were allowed, the Commission would lose all regulatory control over the Timber Lake exchange. Exhibit 22 at pages 131-132.

13. CRSTTA does not pay gross receipts taxes on the telephone exchanges it currently operates. Exhibit 22 at page 123. J. D. Williams, manager of CRSTTA, stated that the state "may impose its gross receipts tax on the income generated from sales to non-Indians and non-members of the area. However, it has no mechanism whereby to force the tribe to collect the tax. The tribe has a sales tax agreement with the state and a similar arrangement may be possible with respect to collecting a gross receipts tax." Exhibit 22 at page 132.

14. CRSTTA proposed a Memorandum of Understanding which provided that CRSTTA would follow the same regulatory procedures found under South Dakota law. Exhibit 145. However, pursuant to that Memorandum of Understanding, the Commission was given no regulatory oversight.

15. The Commission lacks the authority to enter into a tax agreement with a tribal entity. No tax agreement was reached with the state of South Dakota by the close of the record on June 19, 1995.

16. CRSTTA has refused to waive its sovereign immunity in order to provide the Commission with its statutorily mandated regulation of telecommunications services provided by a telecommunications company within the state of South Dakota.

17. CRSTTA has refused to waive its sovereign immunity with regard to the gross receipts tax agreement that it had proposed to enter into negotiations with the state of South Dakota.

18. Local exchange service provided by a telecommunications company is classified as a noncompetitive service. SDCL 49-31-1.1.

19. The South Dakota State Legislature has charged the Commission with important duties in overseeing telecommunications services within the state of South Dakota and

has further vested in the Commission significant powers to protect telecommunications subscribers. SDCL Chapters 49-1, 49-13, and 49-31.

20. If the sale of the Timber Lake exchange to CRSTTA were approved, CRSTTA would not recognize the Commission as having regulatory authority over CRSTTA and the Timber Lake exchange. Exhibit 22 at pages 131-132.

21. Pursuant to SDCL 49-1-17, the Commission is prohibited from approving a sale which would result in the delegation or transfer of powers and duties vested in the Commission. Any delegation of such powers is classified as a Class 2 misdemeanor.

22. Since CRSTTA maintains that there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would also result in the loss of significant tax revenue for cities, counties, and school districts located within the Timber Lake exchange. Exhibits 96, 142; Exhibit 28 at pages 126-129; Transcript of Pierre Hearing at pages 707-727. In effect, in addition to delegating its own authority, the Commission's action could also result in relinquishing the enforcement authority of the state of South Dakota to collect gross receipts taxes.

23. As CRSTTA has declined to waive its sovereign immunity, the Commission similarly declines to give up its jurisdiction.

24. The Commission rejects the proposed findings of fact and conclusions of law submitted by the parties.

From the foregoing Findings of Fact, the Commission now makes its:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over U S WEST and CRSTTA and the sale of the Timber Lake exchange to CRSTTA pursuant to SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, 49-31-20, and 49-31-59. At the final hearing CRSTTA contested the jurisdiction of the Commission pursuant to SDCL 49-31-59 by claiming that it was an ex post facto law. This argument is without merit since ex post facto applies only to criminal laws and laws that assess penalties. Delano v. Pettys, 520 N.W.2d 606, 608 (S.D. 1994). Moreover, the Joint Application was amended on May 1, 1995, which was after the passage of SDCL 49-31-59. In addition, the purchase agreement entered into between U S WEST and CRSTTA specifically provides that U S WEST and CRSTTA would cooperate in obtaining Commission approval for the transfer of assets and authority to CRSTTA. Finally, CRSTTA did not contest, at any of the hearings, the jurisdiction of the Commission pursuant to the other statutes under which the Commission asserts its jurisdiction.

2. The hearings held by the Commission relative to this matter were contested case hearings pursuant to SDCL Chapter 1-26.

3. The Commission finds that the approval of the sale of the Timber Lake exchange to CRSTTA would constitute an improper delegation of authority pursuant to SDCL 49-1-17 and, therefore, this Commission has no authority to approve the sale of the exchange.

4. The Commission lacks the authority to enter into a tax agreement with a tribal entity.

5. The Commission finds that approval of the sale of the Timber Lake exchange would have significant, adverse tax consequences to the taxpayers located in the cities, counties, and school districts within the Timber Lake exchange due to CRSTTA's position that the state lacks the authority to enforce the collection of taxes on the Reservation.

6. The Commission rejects the proposed findings of fact and conclusions of law submitted by the parties.

Pursuant to SDCL Chapter 1-26, the Commission hereby enters its final decision in this docket. It is therefore

ORDERED that the sale of the Timber Lake exchange to the Cheyenne River Sioux Tribe Telephone Authority, through its subsidiary Owl River Telephone, Inc. is not approved; and it is

FURTHER ORDERED that the proposed findings of fact and conclusions of law submitted by the parties are rejected.

Pursuant to SDCL 1-26-32, this Order becomes effective 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 31st day of July, 1995.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: [Signature]

Date: 7-1-95

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

[Signature]
KENNETH STOFFERAHN, Chairman

[Signature]
JAMES A. BURG, Commissioner

[Signature]
LASKA SCHOENFELDER, Commissioner

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE SALE OF CERTAIN) TELEPHONE EXCHANGES BY U S WEST) COMMUNICATIONS, INC. TO CERTAIN) TELECOMMUNICATIONS COMPANIES IN) SOUTH DAKOTA)	DECISION AND ORDER REGARDING SALE OF THE <u>MORRISTOWN EXCHANGE</u> TC94-122 - MORRISTOWN
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PRELIMINARY STATEMENT

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7. A duly noticed public hearing was held at Mobridge, South Dakota, on April 17, 1995, at the City Auditorium, beginning at 8:00 p.m., concerning, along with other sales, the sale of the Timber Lake, McIntosh, and Morristown exchanges. At the time of the hearing, West River Cooperative Telephone, Inc. (West River) was the proposed buyer of the McIntosh exchange. Members of the public testified in opposition to the sale of the Morristown exchange to CRSTTA. The two main concerns of the public were lack of Commission oversight and loss of tax dollars. Exhibit 22 at pages 176-180.

8. A duly noticed public hearing was held at Sturgis, South Dakota, on April 18, 1995, beginning at 7:00 p.m. M.D.T. concerning, along with other sales, the sale of the Nisland exchange. At the hearing, the Buyers announced that CRSTTA would no longer be purchasing the Nisland exchange. Instead, West River proposed to purchase the Nisland and Newell exchanges and CRSTTA proposed to purchase the McIntosh exchange which West River had originally intended to purchase. Exhibit 23 at pages 5-6.

9. The amended Joint Application setting forth the changes in the buyers of the Nisland, Newell, and McIntosh exchanges was filed with the Commission on May 1, 1995. Exhibit

30. Due to the amendment of the Joint Application, the Commission set a new intervention deadline of May 12, 1995. The city of McIntosh and Corson County applied for and were granted intervention. The Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, in McIntosh.

10. On June 1-4, 1995, in Pierre, South Dakota, a final hearing was held concerning all of the proposed exchange sales. Members of the public testified in opposition to and in support of the sale of the Morristown exchange to CRSTTA. Transcript of Pierre Hearing at pages 707-727, 732-737, 770-779.

11. The Morristown exchange is located within the boundaries of the Standing Rock Sioux Reservation and in the states of South Dakota and North Dakota. Exhibit 22 at page 131-132. J. D. Williams, manager of CRSTTA, testified that CRSTTA's subsidiary, Owl River, would be subject to the Commission's jurisdiction in the South Dakota portion of the Morristown exchange, and would be subject to the laws of the Standing Rock Sioux Tribe, and possibly to the laws of North Dakota. Exhibit 22 at pages 131-132.

12. CRSTTA maintains that if the sale of the Morristown exchange to CRSTTA were allowed, the Commission would lose all regulatory control over the Morristown exchange except for the South Dakota portion of the Morristown exchange. Exhibit 22 at page 131-132.

13. CRSTTA does not pay gross receipts taxes on the telephone exchanges it currently operates. Exhibit 22 at page 123. Mr. Williams stated that Owl River will pay gross receipts sales tax on the South Dakota portion of the Morristown exchange. Mr. Williams further stated that the state "may impose its gross receipts tax on the income generated from sales to non-Indians and non-members of the area. However, it has no mechanism whereby to force the tribe to collect the tax. The tribe has a sales tax agreement with the state and a similar arrangement may be possible with respect to collecting a gross receipts tax." Exhibit 22 at page 132.

14. CRSTTA proposed a Memorandum of Understanding which provided that CRSTTA would follow the same regulatory procedures found under South Dakota law. Exhibit 145. However, pursuant to that Memorandum of Understanding, the Commission was given no regulatory oversight.

15. The Commission lacks the authority to enter into a tax agreement with a tribal entity. No tax agreement was reached with the state of South Dakota by the close of the record on June 19, 1995.

16. CRSTTA has refused to waive its sovereign immunity in order to provide the Commission with its statutorily mandated regulation of telecommunications services provided by a telecommunications company within the state of South Dakota.

17. CRSTTA has refused to waive its sovereign immunity with regard to the gross receipts tax agreement that it had proposed to enter into negotiations with the state of South Dakota.

18. Local exchange service provided by a telecommunication company is classified as a noncompetitive service. SDCL 49-31-1.1.

19. The South Dakota State Legislature has charged the Commission with important duties in overseeing telecommunications services within the state of South Dakota and has further vested in the Commission significant powers to protect telecommunications subscribers. SDCL Chapters 49-1, 49-13, and 49-31.

20. If the sale of the Morristown exchange to CRSTTA were approved, CRSTTA would not recognize the Commission as having regulatory authority over CRSTTA and the Morristown exchange, except for the South Dakota portion of the Morristown exchange.

21. Pursuant to SDCL 49-1-17, the Commission is prohibited from approving a sale which would result in the delegation or transfer of powers and duties vested in the Commission. Any delegation of such powers is classified as a Class 2 misdemeanor.

22. Since CRSTTA maintains that there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would also result in the loss of significant tax revenue for cities, counties, and school districts located within the Morristown exchange. Exhibit 96; Exhibit 28 at pages 126-129; Transcript of Pierre Hearing at pages 707-727. In effect, in addition to delegating its own authority, the Commission's action could also result in relinquishing the enforcement authority of the state of South Dakota to collect gross receipts taxes.

23. As CRSTTA has declined to waive its sovereign immunity, the Commission similarly declines to give up its jurisdiction.

24. The Commission rejects the proposed findings of fact and conclusions of law submitted by the parties.

From the foregoing Findings of Fact, the Commission now makes its:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over U S WEST and CRSTTA and the sale of the Morristown exchange to CRSTTA pursuant to SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, 49-31-20, and 49-31-59. At the final hearing CRSTTA contested the jurisdiction of the Commission pursuant to SDCL 49-31-59 by claiming that it was an ex post facto law. This argument is without merit since ex post facto applies only to criminal laws and laws that assess penalties. Delano v. Pettys, 520 N.W.2d 606, 608 (S.D. 1994). Moreover, the Joint Application was amended on May 1, 1995, which was after the passage of SDCL 49-31-59. In addition, the purchase agreement entered into between U S WEST and CRSTTA specifically provides that U S WEST and CRSTTA would cooperate in obtaining Commission approval for the transfer of assets and authority to CRSTTA. Finally, CRSTTA did not contest, at any of the hearings, the jurisdiction of the Commission pursuant to the other statutes under which the Commission asserts its jurisdiction.

2. The hearings held before the Commission relative to this matter were contested case hearings pursuant to SDCL Chapter 1-26.
3. The Commission finds that the approval of the sale of the Morristown exchange to CRSTTA would constitute an improper delegation of authority pursuant to SDCL 49-1-17 and, therefore, this Commission has no authority to approve the sale of the exchange.
4. The Commission lacks the authority to enter into a tax agreement with a tribal entity.
5. The Commission finds that approval of the sale of the Morristown exchange would have significant, adverse tax consequences to the taxpayers located in the cities, counties and school districts within the Morristown exchange due to CRSTTA's position that the state lacks the authority to enforce the collection of taxes on the Reservation.
6. The Commission rejects the proposed findings of fact and conclusions of law submitted by the parties.

Pursuant to SDCL Chapter 1-26, the Commission hereby enters its final decision in this docket. It is therefore

ORDERED that the sale of the Morristown exchange to the Cheyenne River Sioux Tribe Telephone Authority, through its subsidiary Owl River Telephone, Inc. is not approved; and it is

FURTHER ORDERED that the proposed findings of fact and conclusions of law submitted by the parties are rejected.

Pursuant to SDCL 1-26-32, this Order becomes effective 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 31st day of July, 1995.

<p align="center">CERTIFICATE OF SERVICE</p> <p>The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.</p> <p>By: <u>[Signature]</u></p> <p>Date: <u>8-1-95</u></p> <p align="center">(OFFICIAL SEAL)</p>
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BY ORDER OF THE COMMISSION:

[Signature]
KENNETH STOFFERAHN, Chairman

[Signature]
JAMES A. BURG, Commissioner

[Signature]
LASKA SCHOENFELDER, Commissioner

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE SALE OF CERTAIN)	DECISION AND ORDER
TELEPHONE EXCHANGES BY U S WEST)	REGARDING SALE OF THE
COMMUNICATIONS, INC. TO CERTAIN)	<u>MCINTOSH EXCHANGE</u>
TELECOMMUNICATIONS COMPANIES IN)	
SOUTH DAKOTA)	TC94-122 - MCINTOSH

PRELIMINARY STATEMENT

On December 20, 1994, a Joint Application was filed by U S WEST Communications, Inc. (U S WEST), and twenty telecommunications companies (Buyers) requesting that the South Dakota Public Utilities Commission (Commission) approve the sale by U S WEST of 67 local telecommunications exchanges to the Buyers or their affiliates. Specifically, the filing sought:

1. A declaration that the sale and transfer of the exchanges do not require Commission approval or in the alternative that the Commission knows of no reason why the sale and transfer should not occur; and
2. An order from the Commission that U S WEST's gain from the sale be booked to Account 7350 of the Uniform System of Accounts (USOA) as nonoperating income not available for ratemaking purposes.

The Commission assumed jurisdiction over this docket pursuant to its authority under SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, and 49-31-20. The Commission set an intervention deadline of January 25, 1995. Subsequently, the following parties applied for and were granted intervention: AT&T Communications of the Midwest (AT&T); South Dakota Radio Common Carriers [composed of Pierre Radio Paging and Telephone, Inc.; Vantek Communications, Inc.; B&L Communications; Mitchell Two Way Radio; Nelson Electronics, Inc.; Booker Communications; Dakota Electronics; Rees Communications; A & M Radio, Inc.; Frey's Electronics; and Milbank Communications]; Roger D. McKellips; City of Mobridge; Walworth County; Doug Scott; Alcester Telephone System User's Group [composed of Phyllis Bergdale; Bernard Bergdale; Jay Clark; Cleo Clark; Wendell Solberg; Kathy Solberg; Dennis Jones; Robin Jones; Ronald Treiber; Becky Treiber; Gary McKellips; Deb McKellips; David Broadwell; Kathy Broadwell; Donovan Larson; Marlys Larson; Glenice Pilla; and Larry Pilla]; Midco Communications; LDDS; TeleTech; TCIC; FirstTel; TelServ; MCI; Corson County Commission; Thomas Brunner; Gary Brunner; Deanna J. Mickelson; Marjorie Reder; Duane Odle; Baltic Telecom Cooperative; Barbara Mortenson as an individual and a group of telephone users known as the Henry Users Citizens Group. LDDS later filed a petition to withdraw as an intervenor which was granted by the Commission. On March 30, 1995, Senate Bill 240, later codified as SDCL 49-3-59, became effective. The Commission added this statute to the other statutes under which it had asserted its jurisdiction.

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On March 29, 1995, the Commission issued an Order for a Notice of Hearing for six regional evidentiary hearings to be held at various locations throughout the state of South Dakota. Notice of said hearings was given to the public by newspaper publications and radio announcements; personal notice was given to all parties to the docket. Pursuant to said Order of the Commission, and subsequent amended Orders, the following regional evidentiary hearings were held:

1. April 17, 1995, at the City Auditorium, 212 Main Street, Mobridge, South Dakota, for public testimony on the sale of the Selby, Gettysburg, Roscoe, Onida, Bowdle, Morristown, Timber Lake, Lemmon, Eureka, Ipswich, McIntosh, and Mobridge exchanges.
2. April 18, 1995, at the Community Center, 1401 LaZelle, Sturgis, South Dakota, for public testimony on the sale of the Nisland, Newell, and Hermosa exchanges.
3. May 1, 1995, at the St. Mary's Hall, 305 West Third, Winner, South Dakota, for public testimony on the sale of the Winner, Burke, Bonesteel, Reliance, Murdo, Lake Andes, Wagner, Gregory, Witten, Clearfield, Presho, and Platte exchanges.
4. May 3, 1995, at the Lake Area Technical Institute, Student Lounge, 230 11th Street NE, Watertown, South Dakota, for public testimony on the sale of the Webster, Clark, Florence, Hayti, Bradley, Willow Lake, Waubay, Castlewood, Summit, Peever, Veblen, Wilmot, Howard, Oldham, Revillo, and South Shore exchanges.
5. May 4, 1995, at the Johnson's Fine Arts Center, Room 134, Northern State University Campus, Aberdeen, South Dakota, for public testimony on the sale of the Britton, Pierpont, Roslyn, Wessington Springs, Mellette, Bristol, Frederick, Hecla, Doland, Wolsey, and Cresbard exchanges.
6. May 5, 1995, at the Alcester High School Gymnasium, Fifth and Iowa, Alcester, South Dakota, for public testimony on the sale of the Marion, Tyndall, Centerville, Viborg, Lesterville, Tabor, Hudson, Tripp, Parkston, Salem, Alcester, Bridgewater, and Canistota exchanges.

On May 1, 1995, U S WEST and the Buyers filed an amended Joint Application. In its amended Joint-Application, U S WEST and the Buyers stated that since the filing of the Joint Application in December, "the sale of several exchanges to certain buyers has been reevaluated by the Buyers." They requested the following changes:

1. In the Agreement with Golden West Telephone Properties, Inc., delete in Exhibit A the Newell exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly;
2. In the Agreement with West River Cooperative Telephone Company, Inc. (Bison), delete in Exhibit A the McIntosh exchange and add the Newell

and Nisland exchanges, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly; and

3. In the Agreement with Cheyenne River Sioux Tribe Telephone Authority, delete in Exhibit A the Nisland exchange and add the McIntosh exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly.

Due to the amended application, the Commission set a new intervention deadline of May 12, 1995. Subsequently, the city of McIntosh and Corson County applied for and were granted intervention. Because the application had been amended, the Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, McIntosh, South Dakota, for public testimony.

At each regional evidentiary hearing, representatives from U S WEST and each purchasing company were present to testify and were available for cross-examination.

On April 5, 1995, the Commission issued a Notice of Hearing setting the final hearing for June 1-2, 1995. All prefiled testimony was required to be filed by May 25, 1995. A pre-hearing conference was held on May 22, 1995.

The final hearing was held on June 1-4, 1995. At said final hearing, 42 witnesses testified and were available for cross-examination, 126 exhibits were offered and received into the record at the hearing, and an additional 19 exhibits were filed by June 19, 1995, which was the deadline set by the Commission for late-filed exhibits.

On June 7, 1995, the Commission issued a Post-hearing Order requesting briefs on certain issues and allowing the submission of Proposed Findings of Fact and Conclusions of Law. On June 19, 1995, the parties submitted late-filed exhibits. On June 23 and July 3, 1995, the parties filed their post-hearing briefs and Proposed Findings of Fact and Conclusions of Law.

On July 13, 1995, at a duly noticed meeting, the Commission unanimously voted to not approve the sale of the McIntosh exchange to Cheyenne River Sioux Tribe Telephone Authority (CRSTTA) which proposed to purchase the McIntosh exchange through its subsidiary, Owl River Telephone, Inc. (Owl River). With regard to the sale of the McIntosh exchange, in conjunction with the sale of all the other exchanges, the Commission has reviewed all exhibits presented at the seven regional evidentiary hearings, and the final hearing occurring in Pierre, and has considered all testimony provided. The Commission having reviewed the evidence of record and being fully informed in the matter makes the following:

FINDINGS OF FACT

1. U S WEST is a Colorado corporation providing local exchange telecommunications service, interexchange carrier access, intraLATA interexchange telecommunications services, and other telecommunications services throughout South Dakota.

2. On or about December 7, 1994, U S WEST entered into purchase agreements for the sale of 67 local exchanges with 20 local exchange telecommunications companies. On December 20, 1994, U S WEST and the Buyers filed a Joint Application for a Commission Declaration on the Sale and for Proper Accounting Treatment of any Gain. Exhibit 29. U S WEST and the Buyers filed all 20 purchase agreements along with the Joint Application. Exhibits 31-50. One of the purchase agreements entered into was between U S WEST and CRSTTA. Exhibit 32.

3. CRSTTA is a telecommunications company and a division of the Cheyenne River Sioux Tribe. CRSTTA currently provides telecommunications services in South Dakota. Exhibit 22 at page 119.

4. Owl River is a wholly-owned subsidiary of CRSTTA incorporated under the laws of the Cheyenne River Sioux Tribe. Exhibit 22 at page 119. Owl River has no license to do business in the state of South Dakota. Exhibit 22 at pages 145-146.

5. The purchase agreement entered into between CRSTTA and U S WEST states as follows:

Seller and Buyer agree to promptly file any required application and to take such reasonable action as may be necessary or helpful (including, but not limited to, making available witnesses, information, documents, and data requested by the PUC) to apply for and receive approval by the PUC for the transfer of Assets and Authorities to Buyer.

Exhibit 32, Section 6.3, subparagraph D.

6. In the Joint Application filed with the Commission on December 20, 1994, U S WEST and CRSTTA had entered into a purchase agreement where U S WEST proposed to sell the Nisland, Timber Lake, and Morristown exchanges to CRSTTA.

7. A duly noticed public hearing was held at Mobridge, South Dakota, on April 17, 1995, at the City Auditorium, beginning at 8:00 p.m., concerning, along with other sales, the sale of the Timber Lake, Morristown, and McIntosh exchanges. At the time of the hearing, West River Cooperative Telephone, Inc. (West River) was the proposed buyer of the McIntosh exchange.

8. A duly noticed public hearing was held at Sturgis, South Dakota, on April 18, 1995, beginning at 7:00 p.m. M.D.T. concerning, along with other sales, the sale of the Nisland exchange. At the hearing, the Buyers announced that CRSTTA would no longer be purchasing the Nisland exchange. Instead, West River proposed to purchase the Nisland and Newell exchanges and CRSTTA proposed to purchase the McIntosh exchange which West River had originally intended to purchase. Exhibit 23 at pages 5-6.

9. The amended Joint Application setting forth the changes in the buyers of the Nisland, Newell, and McIntosh exchanges was filed with the Commission on May 1, 1995. Exhibit 30. Due to the amendment of the Joint Application, the Commission set a new intervention deadline of May 12, 1995. The city of McIntosh and Corson County applied

for and were granted intervention. The Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, in McIntosh. Testimony was given by members of the public in opposition to the sale of the McIntosh exchange to CRSTTA. Exhibit 28 at pages 118-160. The two main concerns of the public were lack of Commission oversight and loss of tax dollars.

10. On June 1-4, 1995, in Pierre, South Dakota, a final hearing was held concerning all of the proposed exchange sales. Members of the public testified in opposition to and in support of the sale of the McIntosh exchange to CRSTTA. Transcript of Pierre Hearing at pages 707-736, 770-779.

11. The McIntosh exchange is located within the boundaries of the Standing Rock Sioux Reservation. Exhibit 93.

12. CRSTTA maintains that if the sale of the McIntosh exchange to CRSTTA were allowed, the Commission would lose all regulatory control over the McIntosh exchange. Exhibit 28 at page 36.

13. CRSTTA does not pay gross receipts taxes on the telephone exchanges it currently operates. Exhibit 22 at page 123. J. D. Williams, manager of CRSTTA, stated that the state "may impose its gross receipts tax on the income generated from sales to non-Indians and non-members of the area. However, it has no mechanism whereby to force the tribe to collect the tax. The tribe has a sales tax agreement with the state and a similar arrangement may be possible with respect to collecting a gross receipts tax." Exhibit 22 at page 132.

14. CRSTTA proposed a Memorandum of Understanding which provided that CRSTTA would follow the same regulatory procedures found under South Dakota law. Exhibit 145. However, pursuant to that Memorandum of Understanding, the Commission was given no regulatory oversight.

15. The Commission lacks the authority to enter into a tax agreement with a tribal entity. No tax agreement was reached with the state of South Dakota by the close of the record on June 19, 1995.

16. CRSTTA has refused to waive its sovereign immunity in order to provide the Commission with its statutorily mandated regulation of telecommunications services provided by a telecommunications company within the state of South Dakota.

17. CRSTTA has refused to waive its sovereign immunity with regard to the gross receipts tax agreement that it had proposed to enter into negotiations with the state of South Dakota.

18. Local exchange service provided by a telecommunications company is classified as a noncompetitive service. SDCL 49-31-1.1

19. The South Dakota State Legislature has charged the Commission with important duties in overseeing telecommunications services within the state of South Dakota and

has further vested in the Commission significant powers to protect telecommunications subscribers. SDCL Chapters 49-1, 49-13, and 49-31.

20. If the sale of the McIntosh exchange to CRSTTA were approved, CRSTTA would not recognize the Commission as having regulatory authority over CRSTTA and the McIntosh exchange. Exhibit 28 at page 36.

21. Pursuant to SDCL 49-1-17, the Commission is prohibited from approving a sale which would result in the delegation or transfer of powers and duties vested in the Commission. Any delegation of such powers is classified as a Class 2 misdemeanor.

22. Since CRSTTA maintains that there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would also result in the loss of significant tax revenue for cities, counties, and school districts located within the McIntosh exchange. Exhibits 94, 95, 96, 97A, 97B; Exhibit 28 at pages 126-129, 133-137; Transcript of Pierre Hearing at pages 707-731. In effect, in addition to delegating its own authority, the Commission's action could also result in relinquishing the enforcement authority of the state of South Dakota to collect gross receipts taxes.

23. As CRSTTA has declined to waive its sovereign immunity, the Commission similarly declines to give up its jurisdiction.

24. The Commission rejects the proposed findings of fact and conclusions of law submitted by the parties.

From the foregoing Findings of Fact, the Commission now makes its:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over U S WEST and CRSTTA and the sale of the McIntosh exchange to CRSTTA pursuant to SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, 49-31-20, and 49-31-59. At the final hearing CRSTTA contested the jurisdiction of the Commission pursuant to SDCL 49-31-59 by claiming that it was an ex post facto law. This argument is without merit since ex post facto applies only to criminal laws and laws that assess penalties. Delano v. Pettys, 520 N.W.2d 606, 608 (S.D. 1994). Moreover, the Joint Application was amended on May 1, 1995, which was after the passage of SDCL 49-31-59. In addition, the purchase agreement entered into between U S WEST and CRSTTA specifically provides that U S WEST and CRSTTA would cooperate in obtaining Commission approval for the transfer of assets and authority to CRSTTA. Finally, CRSTTA did not contest, at any of the hearings, the jurisdiction of the Commission pursuant to the other statutes under which the Commission asserts its jurisdiction.

2. The hearings held by the Commission relative to this matter were contested case hearings pursuant to SDCL Chapter 1-26.